Ontario Court of Appeal Addresses Important Trial Practice Issues

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In *Girao v. Cunningham*, 2020 ONCA 260, the Ontario Court of Appeal addressed several important issues regarding trials, particularly in personal injury actions. These issues include the use of joint document books; introducing evidence of participant experts and non-party experts; the distinction between section 35 and section 52 of the *Evidence Act*; and advising the jury of accident benefits settlements.

Background

The action arose out of a car accident in 2002. The plaintiff alleged that she sustained pain in her back and neck that eventually became chronic, as well as other symptoms, including major depression. She was not able to continue with her job as a cleaner.

The defendants' position was that the accident was minor and did not cause the plaintiff's problems. They pointed to pre-accident psychiatric issues. They also argued that the plaintiff was a malingerer. They elicited evidence that the plaintiff received more in a statutory accident benefits settlement than she would have received in her job as a cleaner.

The jury awarded the plaintiff non-pecuniary general damages of $45,000. However, the trial judge held that the plaintiff did not meet the threshold. The jury also awarded damages for past loss of income in the amount of $30,000, but this was reduced to zero after deducting statutory accident benefits.

As a result, the plaintiff did not recover anything. She was ordered to pay the defendants' fees and disbursements of over $300,000.

The plaintiff was self-represented at trial and on the appeal. She has substantial difficulty with the English language.

The Court of Appeal held that there was a substantial wrong or miscarriage of justice. A new trial was ordered.

The Court of Appeal said that there was particular unfairness because an accident benefits assessor called by the plaintiff was not permitted to testify on the substance of his report and because the defence relied on the report of a doctor for the truth of its contents without making the doctor available for cross-examination.

Moreover, the Court of Appeal held that defence counsel improperly cross-examined the plaintiff on her accident benefits settlement.

Joint Books of Documents

The Court of Appeal stated that counsel frequently do not turn their minds to the purpose and use of joint document books, and that this must change as a matter of ordinary civil trial practice.

The Court of Appeal expanded on its previous decision in *Blake v. Dominion of Canada General Insurance Company*, 2015 ONCA 165, wherein it was stated that the use of document briefs at trial may range from "acting merely as a convenient repository of documents, each of which must be proved in the ordinary way, through an agreement about the authenticity of the documents, all the way to an agreement that the documents can be taken as proof of the truth of their contents".

In *Girao*, the Court of Appeal indicated that counsel and the court have to address the following questions regarding joint books of documents:

1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?
2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?
3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?
4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?
5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?
6. Does any party object to a document in the document book, if it has not been prepared jointly?

The Court of Appeal indicated that it is preferable for counsel to have a written agreement addressing these matters in all civil cases. Further, it is preferable for the trial judge and

counsel to go through the agreement line by line on the record to ensure that there are no misunderstandings.

In summary, counsel must consider what use is going to be made of joint document books. Frequently, joint document books are prepared shortly prior to trial. As a matter of practice, it is preferable for counsel to have a discussion on joint document books well in advance of trial.

Unless there is agreement between counsel on the use of documents, where necessary, and subject to sections 35 and 52 of the *Evidence Act* (discussed below) and any admissions by the opposing party, counsel should be prepared to call the authors of the documents at trial.

Exhibits at Trial

The Court of Appeal said that any document introduced by any party that does not become a numbered exhibit should become a lettered exhibit. The important distinction between numbered exhibits and lettered exhibits is that, subject to the trial judge's discretion, lettered exhibits do not go in with the jury during its deliberations, but numbered exhibits do.

Regarding expert reports, it is normally understood that the admissible evidence of the expert is his or her oral evidence, particularly in jury trials. However, the best practice in jury trials is to make expert reports lettered exhibits in order to preserve the integrity of the trial record for the purpose of an appeal.

Expert Evidence

A person who has expertise, but who is not qualified as an expert witness under rule 53.03 of the *Rules of Civil Procedure*, may be entitled to provide opinion evidence. Such experts were described in *Westerhof v. Gee Estate*, 2015 ONCA 206, as "participant experts" and "non-party experts".

Participant experts, such as treating physicians, form opinions based on their participation in the underlying events.

Non-party experts are retained by a non-party to the litigation and form opinions based on personal observations or examinations that relate to the subject matter of the case, but for another purpose. An example is a medical assessor in a claim for statutory accident benefits.

The test for admissibility of opinion evidence from participant experts and non-party experts is the same that applies to litigation experts. The evidence must be relevant; it must be necessary in assisting the trier of fact; no other evidentiary rule should apply to exclude it; and the expert must be properly qualified. Then, the trial judge must execute the gatekeeper function.

Distinction Between Sections 35 and 52 of the Evidence Act

Hearsay evidence is presumptively inadmissible. However, there are certain exceptions to the hearsay rule under which a statement may be adduced for the truth of its contents. Two such exceptions are found in sections 35 and 52 of the *Evidence Act*.

Section 35 relates to business records. It provides that "any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter".

The Court of Appeal stated that section 35 is not a proper basis on which to admit opinion evidence and noted the following comment from *Westerhof*: "[b]ecause these reports were tendered under s. 35 of the *Evidence Act*, the opinions concerning causation were not admissible for the truth of their contents".

Therefore, if a party seeks to admit documents under section 35 of the *Evidence Act*, the opposing party should ensure that the documents do not contain impermissible opinion evidence. The documents may need to be redacted.

Section 52 of the *Evidence Act* relates to medical reports that are signed by a practitioner. It is more expansive than section 35. Section 52 permits the court to allow the report to be admitted in evidence without the need to call the practitioner. The opinion can be entered for the truth of its contents.

However, the trial judge must, at the request of an opposing party, require the medical practitioner to testify in order to permit cross-examination. If the practitioner is not made available for cross-examination on request, then his or her opinion is not admissible for any purpose.

In order to admit documents under sections 35 and 52, a notice of intention to rely on these documents must be served. The deadline in section 35 is seven days prior to trial. The deadline in section 52 is 10 days prior to trial.

Care should be taken when preparing these notices. In *Reimer v. Thivierge*, [1999] OJ No 4074, the Court of Appeal stated

> The mistake counsel for the defence made in this case was in serving a notice under s. 52 of the Evidence Act. Since he had obtained the reports from the plaintiffs through the discovery process, he did not have to give notice that he might make use of them in cross-examination or otherwise. The plaintiffs knew he had them. The only reason for serving the notice under s. 52, assuming counsel put his mind to it, was to have them introduced as evidence for the proof of their contents. Once he did that, based on the authorities referred to above, it is my opinion that the reports were tendered by the defence, that the authors became de facto defence witnesses, and that therefore the trial judge erred in not allowing plaintiff's counsel to cross-examine the authors of the reports.

Therefore, a notice of intention under section 52 of the *Evidence Act* is only required when a party wishes to admit into evidence a report of a medical practitioner for the truth of its contents. When a report is listed by a party under section 52, the medical practitioner becomes that party's witness and is subject to cross-examination by the opposing party.

Disclosure of Accident Benefits Settlements

The Court of Appeal considered whether defendants can reveal to the jury details of a plaintiff's statutory accident benefits settlement. The Court noted that trial judges have wrestled with this issue and that the cases are mixed.

The Court of Appeal indicated that a trial judge has broad discretion to control the proceedings to ensure that trial fairness results.

It falls to the trial judge in a tort action to decide contextually whether and to what extent evidence regarding an accident benefits settlement is to be admitted. The principles of evidence law guide the decision.

The first question is whether the evidence is relevant to a fact in issue in the tort action. The second question is whether the probative value of the evidence would exceed its prejudicial value.

The Court of Appeal stated that evidence regarding some of the individual benefits received in the accident benefits settlement would be relevant and admissible if the allegation is made that the plaintiff's abuse of a benefit will have an impact on the calculation of the tort damages.

For example, if the defence pleads that the plaintiff failed to use the earmarked settlement proceeds to mitigate certain future losses, then certain details of a settlement will be directly relevant to whether the defendant or the plaintiff is liable for the future losses.

Before introducing such evidence, the pleadings must have put the issue into dispute with appropriate particularity. Further, there must be an air of reality to the issue, which is to be addressed in a *voir dire*.

This same proviso applies to a defence allegation that a plaintiff is malingering or lacks the motivation to work. However, on these matters, the Court of Appeal said that the core issue is whether the plaintiff is able to return to work, not the motivation to work.

A plaintiff's motivation to work is a collateral issue related to the credibility of the assertion that she or he is unable to work. In determining the extent of evidence to permit on the issue of a plaintiff's alleged malingering or motivation to work, a trial judge has to balance of prejudicial effect and probative value of such evidence.

Although counsel are afforded broad scope for cross-examining a witness on matters related to credibility, there are limits. Counsel must have a good faith basis to ask the questions, cannot take "cheap shots", and cannot be "sarcastic, personally abusive and derisive".

In addition, the Court of Appeal stated that the totality of an accident benefits settlement would rarely be relevant and would usually be more prejudicial than probative, particularly in a jury trial, even when the defence alleges that the plaintiff is malingering or lacks the motivation to work. These allegations are easy to make and difficult for a plaintiff to defuse.

The Court of Appeal said that there are public policy grounds for being cautious about admitting evidence on the totality of an accident benefits settlement. It can undermine the tort claim and can expose the plaintiff to unfairness.

Further, making this evidence generally admissible in tort actions can create a perverse incentive on a plaintiff to keep the accident benefits claim alive so that it does not become a defence weapon in the tort action. This goes against the general principle of encouraging settlement.

Lastly, where an accident benefits settlement is in evidence before the jury, the jury instructions should carefully explain how the motor vehicle accident compensation system in Ontario functions, including the fact that the plaintiff was entitled to the accident benefits, and the distinct roles of the trial judge and the jury in setting the tort damages and accounting for benefits received.

The jury should be instructed to not reduce the award of damages on the basis that it believes the benefits have compensated the plaintiff adequately for the accident.

In summary, the details of particular benefits received by a plaintiff may be admissible if they are relevant to issues such as misuse of a benefit, mitigation, or lack of motivation to work. The probative value and prejudicial effect of such evidence have to be weighed.

Defence counsel have to draft their pleadings with particularity to put these matters squarely in issue. Further, the trial judge must be satisfied that there is an air of reality to these arguments.

The details of the totality of an accident benefits settlement will rarely be admissible in a tort trial.

Self-Represented Litigants at Trial

Referring to the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) issued by the Canadian Judicial Council, the Court of Appeal noted that a trial judge has to do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented litigants. Self-represented litigants should not be denied relief on the basis of a minor or easily rectified deficiency in their case.

Trial judges have special duties to self-represented litigants, in terms of acquainting them with courtroom procedure and the rules of evidence.

However, the Court of Appeal stated that there are clear limits to a trial judge's duty to assist a self-represented litigant. The actuality and the appearance of judicial impartiality must be maintained.

Counsel, as officers of the court, have to assist the trial judge on legally complex topics, including by providing "briefing notes" or statements of law. The trial judge should request such assistance where necessary.

Further, although the right to a jury trial in a civil action is fundamental, it is not absolute and must sometimes yield to practicality. In exercising his or her discretion to discharge the jury, a trial judge may consider whether the self-represented status of a litigant might unduly complicate or lengthen the trial.

However, in many if not most cases, a trial judge should be able to fairly manage a civil jury trial with a self-represented litigant, with the willing assistance of counsel acting in the best traditions of officers of the court.

Conclusion

In *Girao*, the Court of Appeal addressed several important issues regarding trials. The key points are:

- Counsel and the court must have a clear understanding of what use will be made of joint books of documents.

- The court must keep a clear record of all documents introduced at trial, regardless of whether the documents are entered into evidence.

- Section 35 of the *Evidence Act* is not a proper basis on which to admit opinion evidence.

- Section 52 of the *Evidence Act* is more expansive than section 35. It permits signed medical reports to be entered for the truth of their contents. The medical practitioner must be made available for cross-examination, if requested by the opposing party.

- If defence counsel wants to introduce evidence of particular accident benefits received by a plaintiff for the purpose of showing misuse of a benefit, failure to mitigate, or lack of motivation to work, the statement of defence must be drafted with particularity, and counsel must be able to show that there is an air of reality to the argument in a *voir dire*. The details of the totality of an accident benefits settlement will rarely be admissible.